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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TONY B. SESSUMS — APPELLANT

VERSUS

TAMMY VANCE — APPELLEE

SUPREME COURT DOCKET NO. : 2008-CA-00198

APPEAL FROM THE
CHANCERY COURT OF NEWTON COUNTY

BRIEF OF APPELLEE

TAMMY VANCE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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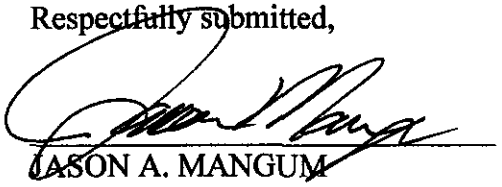
Respectfully submitted,



JASON A. MANGUM

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STATEMENT OF RELEVANT FACTS

Tony B. Sessums [hereinafter "Tony"] and Tammy (Sessums) Vance [hereinafter "Tammy"] received a Judgment of Divorce based on irreconcilable differences on June 29, 2005. (R.E[1]. p. 13). The Judgment directed Tony to pay $750 per month in child support. (R.E. p.20). Subsequent to the divorce, Tony left his local employer and took a job that required a 102 mile daily commute. (T. p. 5). He also moved in with his girlfriend and began paying part of her expenses. (T. p. 11).

At the time of the divorce Tony also held a part-time job with a local cattle farmer which paid $600 per month. (T. p.6). This employer sold his cattle and no longer needed Tony, thus that income ceased. (T. p. 6). Tony decided not to seek employment to replace the part-time job that he had lost. (T. p. 28).

On January 11, 2007, Tony filed a Petition to Modify. (R.E. p. 7). An Answer and Counter-Complaint for Modification and Contempt and Other Relief was then filed by Tammy. (R.E. p. 3). After a hearing, the Chancellor entered an Order denying Tony's Motion to Mofify and finding him in contempt for failure to pay child support and other obligations. (R.E. p. 23). From that Order this Appeal was taken. (R.E. p. 29).

[1] The following abbreviations will be used: R.E. for Appellant's Record Excerpts; T for Transcript.

SUMMARY OF THE ARGUMENT

Modification of a child support obligation is warranted only if there has been a substantial or material change in circumstances. One of the circumstances that a court may consider is whether there has been a change in the earning capacity of either party. Tony demonstrated that his earnings had decreased somewhat due to the loss of the part-time job. He did not, however, show that he had lost the ability to earn as much as he had earned before. Instead of seeking a replacement part-time job, he made a conscious decision not to do so.

Further, in order for a change to be sufficiently substantial to warrant a change in child support, the change must affect the ability to comply with the prior judgment. After deducting expenses and child support, Tony was left with significant excess income. The loss of the part-time job, whether or not it was replaced, did not prevent Tony from being able to pay the amount of child support to which he had so recently agreed. Also, the fact that only eighteen months had passed from the time of the divorce until Tony sought modification of the decree weighed heavily against the granting of a modification.

The Chancellor's decision was supported by the fact that Tony did not seek alternate employment, he moved in with his girlfriend thus incurring increased expenses, he remained able to pay the previously agreed upon child support, and he filed the Motion to Modify relatively soon after the divorce had been granted. Thus, the Chancellor did not abuse his discretion by refusing to grant the Motion to Modify to reduce the child support obligation.

The Chancellor was justified in ordering Tony to pay attorney fees in the amount of $1750. Tony was unsuccessful in his modification action. Further, he was found in civil contempt for failure to pay child support as previously ordered. The Chancellor discussed with

the attorneys the basis for the award of attorney fees and the nature of the services rendered. There was no abuse of discretion in awarding attorney fees in that modest amount.

ARGUMENT

I. The Chancellor did not abuse his discretion in refusing to modify child support.

An appellate court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Brown v. Brown*, 724 So. 2d 874 (¶16) (Miss. 1998). A careful review of the record will demonstrate that ample facts and circumstances support the Chancellor's decision in the case *sub judice.*

Modification of a child support award may be appropriate if it can be shown that there has been a substantial or material change in the circumstances of one or more of the interested parties: the father, the mother, and the child or children, arising subsequent to the entry of the decree to be modified. *Edmonds v. Edmonds*, 935 So. 2d 980 (¶19) (Miss. 2006). The Mississippi Supreme Court has articulated several factors to be considered in determining if a material change has occurred, including: (1) increased needs caused by advanced age and maturity of the children (2) increase in expenses, and (3) inflation factor. Other factors include (4) the relative financial condition and earning capacity of the parties, (5) the health and special needs of the child, both physical and psychological, (6) the health and special medical needs of the parents, both physical and psychological, (7) the necessary living expenses of the father, (8) the estimated amount of income taxes the respective parties must pay on their incomes, (9) the free use of a residence, furnishings, and automobile and (10) such other facts and circumstances that bear on the support subject shown by the evidence. *Id.*

It is difficult to envision any set of circumstances wherein at least one of those factors will not have changed to some degree. Nevertheless, such a change does not automatically become a material change. Obviously, a chancellor must weigh the factors to determine whether collectively they constitute a "material change."

A. Facts supporting the Chancellor's decision

1. Tony failed to demonstrate any loss of earning capacity.

Tony relies heavily on his reduction in income as justification for a reduction in his child support obligation. However, income is not the determinative factor. In fact, income is not listed as one of the factors ordinarily considered. Instead the court correctly considers "the relative financial condition and earning capacity of the parties." *See Edmonds v. Edmonds*, 935 So. 2d 980 at (¶19)(listing some of factors to consider)(emphasis added). Thus earning capacity, not income, is the factor to be considered.

This emphasis on earnings capacity is shown by other decisions. The Mississippi Supreme Court has affirmed a refusal to modify child support downward based on lower income where it was shown that the obligor had greater earning capacity than that reflected by his earnings. In *Poole v. Poole*, 701 So. 2d 813 (Miss. 1997), a physician filed a motion to modify his child support obligation. The chancellor refused to reduce child support, finding that no licensure board prevented the physician from practicing his specialty. *Id.* at (¶21). The Mississippi Supreme Court concluded that the chancellor was not manifestly in error in finding that the father failed to establish that he was unable to earn more income by pursuing his specialty.

Applied to the case *sub judice,* the Chancellor questioned Tony about his choice not to seek another part-time job. (T. pp.29-30). As the Chancellor stated in questioning Tony,

Q: Well, it's because you only have one job. You had two before.

A. Uh-huh.

Q. And now you only have one. So, it's only natural that you're going to have less money, right?

A. Right

Q. So, what do we do about that? I guess that we're saying is is that in order for you to have more money there are several options. One of which is you can go find another job or we can just take from her. Why don't we take it from their mom and then you can spend it the way you want, which may be on them or may not. Does that sound about right?

A. Like I said, all I wanted was something to do extracurricular with them.

In short, Tony made a conscious decision to live without the additional income. His earnings capacity had not changed. As the Chancellor correctly noted, Tony could have sought another job. Instead, he sought to reduce the child support payments to which he had agreed only eighteen months earlier.

2. Tony remains fully capable of complying with the previous judgment.

Tony argues that the loss of his part-time job warrants a reduction in his child support obligation. Regardless of the loss of the part-time job Tony remains financially able to comply with the original divorce decree.

In addition to providing factors to be considered in determining whether a material change has occurred, the Mississippi Supreme Court has provided a clear standard by which such changes may be deemed sufficient to modify a child support obligation. In order to warrant a modification of child support, any material change in circumstances must be such as reasonably to affect the ability of the parties to abide by it and perform the original decree. *Bailey v. Bailey*, 724 So. 2d 335 (¶12) (Miss. 1998).

Applied to the facts of this case, Tony's expenses have increased since the divorce because he has moved in with his girlfriend and pays expenses for her. (T. p. 11). Further, he voluntarily quit his local employment and took a job that requires a 102 mile daily commute. (T. pp. 5, 12). Although he lost his part-time weekend job, he consciously decided not to seek another. (T. p. 28). Finally, and most importantly, Tony's own financial statement clearly shows that he can afford to pay the child support obligation to which he agreed in the original divorce. Including child support, Tony's monthly expenses were approximately $1650. (T. p. 27). His income is $1913. (T. p. 27). This leaves Tony with $263 more than his monthly expenses and child support. There can be little question but that he has the ability to meet his obligations under the original decree.

3. Only a short time passed between the original divorce and the motion to modify child support.

A short interval between the granting of a divorce and a party seeking to modify that divorce weighs heavily against modification. This is demonstrated in *Magee v. Magee*, , 755 So. 2d 1057 (Miss. 2000), which is factually similar to the case before the Court. In *Magee*, the parties obtained a divorce by agreed order wherein the father agreed to pay $1000 per month in child support. *Id.* at (¶2). Seventeen months later, the husband sought to reduce the child support

obligation. *Id.* at (¶14). Subsequent to the divorce, the husband had experienced a variety of financial reverses. *Id.* at (¶3). In addition, he had remarried. *Id.* at (¶4).

In affirming the chancellor's decision to deny the modification of child support, the *Magee* court noted that the short lapse of time between the divorce and the petition for modification was itself a weighty consideration which does not bode well for the father. *Id.* at (¶14).

With regard to the case *sub judice,* a judgment of divorce between the parties was filed on June 29, 2005. (R.E. p. 14). A Petition to Modify was filed by Tony approximately eighteen months later on January 11, 2007. (R.E. p. 7). This, by the rationale of *Magee* is a "weighty consideration" against modification.

B. Cases relied upon by Tony are distinguishable.

Tony relies on *Austin v. Austin*, 981 So. 2d 1000 (Miss. App. 2007) for the proposition that a substantial reduction in income may be a material change in circumstances. While this general contention is not disputed, *Austin* differs significantly from the case *sub judice*. In *Austin* the father's income had been reduced by two-thirds. *Id.* at (¶19). Tony's income was reduced by only 23.8 percent. More importantly, the movant in *Austin* alleged that he was no longer able to pay the child support originally ordered. *Id.* at (¶3, n.3). Tony has neither claimed nor proven that he is unable to pay the child support to which he agreed. Also, there was no suggestion that the father in *Allen* had the ability to replace the lost income from other employment. Finally, the appellate court did not state that such a reduction was always a material change. Rather, the court simply found no error in the chancellor's decision that a material change justifying modification had, in fact, occurred.

Similarly Tony cites *Dill v. Dill*, 908 So. 2d 198 (Miss. App. 2005) to demonstrate that a substantial reduction in income may be a material change warranting modification. However, the Court of Appeals held that the clean hands doctrine precluded a determination on the merits of the petition to modify so that the relief awarded pursuant thereto constituted manifest error.*Id.* at (¶10). Admittedly, in *dicta* the Court did state that, "We have little doubt that a decrease in one's monthly income from $ 2,866 to $ 1,644 qualifies as a material and substantial change, particularly when one's alimony and child support obligation equals $ 1,200."

However, the facts of the case *sub judice* rendered this comparison invalid. Whereas, the movant in *Dill* suffered a 43 percent reduction in income, Tony suffered only a bit more than half of that percentage. More importantly, from the movant's $1644 income in *Dill,* he was required to pay $1200 in alimony and child support. Tony, on the other hand, continues to have income of $1913. (T. p. 27). From this he pays child support of $750. His expenses, including child support total $1650 (T. p. 27). Unlike the movant of *Dill,* Tony remains able to pay the child support to which he agreed in the original divorce.

II. The chancellor correctly ordered payment of attorney fees.

The Order entered by the Chancellor found Tony in civil contempt. (R.E. p. 23). The Chancellor further dismissed Tony's Motion for Modification, finding that no material and substantial change of circumstances had occurred. (R.E. p. 23). Each of these findings warrants the assessment of attorney fees. The Mississippi Supreme Court has held that award of attorney fees is proper in a contempt action. *Herrington v. Herrington,* 660 So. 2d 215, 218 (Miss. 1995). Further, the Court has held that when a former husband brings his former wife into court seeking, without justification, alteration of his liability to her from a court decree fixing it, he should pay for her an attorney's fee. *Gregg v. Montgomery*, 587 So. 2d 928, 934 (Miss. 1991). The reason

being that otherwise, he could sue her so often as to impose an oppressive burden on her allowance in resisting his repeated applications. *Id.*

An award of attorney's fees is generally left to the discretion of the chancellor, and the chancellor's findings on the issue of attorney's fees will not be disturbed unless manifestly wrong. *Holloway v. Holloway*, 865 So. 2d 382 (¶2) (Miss. 2003).

It is clear that the Chancellor carefully considered the circumstances in making his award of $1750. In his discussion with the attorneys he noted that attorney fees would be awarded for the defense of the modification action. (T. p.38). Further, the Chancellor noted that part of the action was for contempt. (T. p. 40). The Chancellor also considered that the attorneys had appeared on a previous trial date, but the case was continued. (T. p. 42). Taking all of that into consideration the Chancellor, then, awarded $1750 in attorney fees.

CONCLUSION

For the foregoing reasons the Order of the Chancery Court should be affirmed.

CERTIFICATE OF SERVICE

I, Jason A. Mangum, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing brief to the following:

P. Shawn Harris, Esquire
P.O. Box 649
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Honorable H. David Clark, II
Chancellor
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SO CERTIFIED, this the 26th day of August, 2008.

JASON A. MANGUM

CERTIFICATE OF FILING

I, Jason A. Mangum, attorney for the Appellee, Tammy Vance, do hereby certify that I have this date filed Brief of Appellee by depositing an original and three copies of Brief of Appellee with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 25th day of August, 2008.

JASON A. MANGUM